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WTK REALTY SDN BHD v. KATHRYN MA WAI FONG & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
RAVINTHRAN PARAMAGURU JCA
B GHAZALI CHA JCA
[CIVIL APPEAL NOS: Q-02(NCVC)(A)-2476-12-2017
& Q-02(NCVC)(A)-2490-12-2017]
15 APRIL 2024

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Abstract – *The categories for the invocation of the 'just and equitable' ground, to wind up a company, pursuant to s. 465(1)(h) of the Companies Act 2016, are not closed and are not limited to quasi-partnership companies only. In a family company, run on the basis of mutual trust and confidence between its shareholders, a breakdown of the mutual trust and confidence among the shareholders was sufficient for the invocation of 'just and equitable' ground for winding-up.*

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COMPANY LAW: *Winding up – Petition – Application for – Application to wind up company based on just and equitable provision – Whether company family company – Whether mutual trust and confidence established – Whether mutual trust and confidence extended to petitioner – Whether just and equitable ground confined to quasi-partnerships only – Whether there was breakdown of mutual trust and confidence – Whether just and equitable to wind up company – Companies Act 2016, s. 465(1)(h)*

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WTK Realty Sdn Bhd ('WTK') was a company founded by the late Datuk Wong Tuong Kwang ('deceased') in 1981. After suffering a stroke in 1993, the deceased handed over the management of the WTK Group to his sons, namely Datuk Wong Kien Nai ('WKN'), Datuk Wong Kie Yik ('WKY') and Datuk Wong Kie Chie ('WKC'). The deceased passed away in 2004 and, apart from his three sons, he was survived by his wife and three daughters. The WTK Group was then managed by WKN until he was stricken with illness and passed away in 2013. WKN left behind his widow ('Kathryn'), a son and a daughter. Kathryn became the executor of the estate of WKN and had applied, at the High Court, to wind up WTK under s. 465(1)(h) of the Companies Act 2016, *ie*, the just and equitable provision. In support of her petition, Kathryn submitted that (i) the management of the company's business was based on mutual trust and confidence and/or good faith between the members of the Wong family and the purpose of the company was for the profitable and equitable distribution of family wealth between families of the children of the deceased. Since the death of WKN, the relationship of mutual trust and confidence had irretrievably broken down; (ii) injunctions had been obtained to prevent dealings with disputed shares in the companies under the WTK Group, including WTK. Thus, it would mean

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that the votes could not be cast at a general meeting until the legal proceedings were resolved. Furthermore, WTK did not declare dividends for a number of years and deprived Kathryn's family a fair return. The Judicial Commissioner ('JC') granted the petition and wound up WTK. Hence, the present appeals by (i) WTK ('first appeal'); and (ii) WKY and WKC, who were the contributories of WTK ('second appeal'). In support of their appeals, the appellants argued that, *inter alia*, there was no mutual trust and confidence between anyone in the family beyond the three brothers who shared a special relationship when it came to control and management of the WTK Group of companies. In any event, it ceased upon the death of WKN and did not extend to the latter's family.

Held (dismissing appeals)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) The company was incorporated by WTK in 1981 and since then, the management and ownership of the company had, to all intents and purposes, been the exclusive preserve of the members of the Wong family. After the passing of the founder, the management of the company was passed on to the three brothers, WKN, WKC and WKY. In fact, even before the passing of the founder, WKN became the managing director of the other companies in the WTK Group. Subsequently, the children of the three brothers also participated in the management. The three brothers also passed on their own shares to the children. The finding of the High Court that the respondent was a family company was undoubtedly correct. The finding of the JC, that the respondent was run on the basis of mutual trust and confidence between its shareholders, could not be challenged as there was ample evidence to support it. (paras 19-23)

(2) The categories for the invocation of the 'just and equitable' ground were not closed and it was not limited to *quasi*-partnership company only. The court can take into account all relevant circumstances that led to the filing of the petition, including the fact that other winding up petitions had been filed against related companies by same parties. The fact that the contributories had taken an opposite stand in a petition to wind up a related company controlled by Kathryn's family was relevant although not necessarily determinative of the petition in question. Therefore, the relationship of mutual trust and confidence between the family of Kathryn and that of WKY and WKC had broken down. Breakdown of mutual trust and confidence among shareholders in a family company was sufficient to invoke the 'just and equitable' ground for winding up. (paras 31 & 56-59)

Case(s) referred to:
Chow Kwok Chuen v. Chow Kwok Chi And Anor [2008] 4 SLR(R) 362 ***(refd)***
Ebrahimi v. Westbourne Galleries Ltd [1973] AC 360 ***(refd)***
Goodwealth Trading Pte Ltd, Re [1991] 2 CLJ 1648; [1991] 4 CLJ (Rep) 822 ***(refd)***

A *Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd [2010] 8 CLJ 775 CA* ***(refd)***

Narayani Sivaprakaspillai & Ors v. Teluk Anson Agricultural Enterprises Sdn Bhd [2011] CLJU 989; [2011] 1 LNS 989 HC ***(refd)***

Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals [2012] 2 CLJ 501 FC ***(refd)***

B *Parmalat Capital Finance Ltd And Others v. Food Holdings Ltd (In Liquidation) And Another [2008] UKPC 23* ***(refd)***

Perak Integrated Networks Services Sdn Bhd v. Urban Domain Sdn Bhd & Anor [2018] 5 CLJ 513 FC ***(refd)***

Tai Hean Leng v. New Future Capital Sdn Bhd [2018] CLJU 1647; [2018] 1 LNS 1647 HC ***(refd)***

C *Tan Keen Keong v. Tan Eng Hong Paper & Stationery Sdn Bhd & Ors And Other Appeals [2021] 2 CLJ 318 FC* ***(refd)***

Tang Choon Keng Realty (Pte) Ltd & 2 Ors v. Tang Wee Cheng [1992] 2 SLR 1114 ***(refd)***

Tien Ik Enterprises Sdn Bhd & Ors v. Woodsville Sdn Bhd [1995] CLJU 99; [1995] 1 LNS 99 SC ***(refd)***

D *Varusay Mohamed Shaik Abdul Rahman v. SVK Patchee Brothers (Malaysia) Sdn Bhd [2002] 3 CLJ 741 CA* ***(refd)***

Legislation referred to:
Companies Act 1965 (repealed), s. 218(1)(i)
Companies Act 2016, ss. 465(1)(h), 477

E *(For the Civil Appeal No: Q-02(NCVC)(A)-2476-12-2017)*
For the appellant - Sim Hui Chuang; M/s Reddi & Co
For the respondent - Alvin Yong Sze Lung; M/s Alvin Yong

(For the Civil Appeal No: Q-02(NCVC)(A)-2490-12-2017)
For the appellants - Stanley Eddy & Chan Yin Xi; M/s Battenberg & Talma
F *For the 1st respondent - Alvin Yong Sze Lung; M/s Alvin Yong*
For the 2nd respondent - Sim Hui Chuang; M/s Reddi & Co

[Editor's note: Appeal from High Court, Sibu; Companies (Winding-Up) No. SBW-28NCC-2-5-2017(HC) (affirmed).]

G *Reported by Najib Tamby*

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

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[1] There are two appeals before us. Both appeals originate from the same decision of the High Court sitting in Sibu was which is dated 6 November 2017. The matter before the High Court was the petition by Kathryn Ma, who is the executor of the estate of her late husband, Datuk Wong Kie Nai (WKN). Kathryn Ma applied to wind up WTK Realty Sdn Bhd under s. 465(1)(h) of the Companies Act 2016, which is the "just and equitable provision". The learned Judicial Commissioner granted the petition and wound up WTK Realty Sdn Bhd. Her Ladyship also granted the ancillary orders. However, a stay was subsequently granted.

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[2] The appellant in the first appeal (Appeal Q-02(NCvC)(A)-2476-12-2017) is WTK Realty Sdn Bhd. The two appellants in the second appeal (Appeal Q-02(NCvC)(A)-2490-12-2017) are the contributories of WTK Realty Sdn Bhd. They are also the brothers of the late WKN.

Background Facts

[3] The undisputed background facts set out in the judgment of the High Court are as follows. WTK Realty Sdn Bhd is a company founded by the late Datuk Wong Tuong Kwang in 1981. Over the years, it has grown into a large conglomerate, controlling many companies with diverse commercial interests in Malaysia, Liberia, Australia, the British Virgin Islands (BVI), Singapore and Papua New Guinea (PNG). But WTK Realty Sdn Bhd remained the flagship company of the business empire founded by the late Datuk Wong Tuong Kwang.

[4] After suffering a stroke in 1993, the founder handed over the management of the WTK Group to his sons, namely, Datuk Wong Kien Nai (WKN), Datuk Wong Kie Yik (WKY) and Wong Kie Chie (WKC). Datuk Wong Tuong Kwang passed away intestate on 10 November 2004. Apart from his three sons, he was survived by his wife (since deceased) and three daughters. Thereafter, the WTK Group was managed by WKN until he was stricken with illness and passed away on 11 March 2013. WKN left behind his widow (Kathryn Ma), a son (Neil Wong) and a daughter (Mimi Wong). All three are beneficiaries of the estate under a will. Kathryn Ma became the executor of the estate of WKN. She was granted probate in Malaysia and other jurisdictions where the WTK Group had business interests.

Dispute

[5] Since the death of WKN, at least 43 suits were filed in Sarawak alone involving companies in the WTK Group. On the one side was Kathryn Ma and/or companies controlled by her. On the other side are families of WKY and WKC and/or companies which they controlled.

[6] Some of the litigation instituted by the two factions involved applications to wind up companies controlled by the other side. For example, on 13 June 2016, Arctic Star Sdn Bhd was a company in which the majority stake was held by the estate of WKN. WKY and one Hj Wahab bin Ismail as contributories applied to wind it up under the just and equitable provision. The respondent company did not object to the petition. In the later part of 2016, Kathryn Ma successfully wound up five companies in the WTK Group on 17 October 2017. In May of 2017, Kathryn Ma filed five winding up petitions which included the instant one which is against the flagship company of the WTK Group.

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Grounds Of The Petition

[7] As we said earlier, Kathryn Ma had relied on the just and equitable provision of s. 465(1)(h) of the Companies Act 2016 to wind up WTK Realty Sdn Bhd. She averred that WTK Realty Sdn Bhd is a family company. She pleaded that the estate of WKN owns 8,168,000 shares of WTK Realty Sdn Bhd, which represents 42.65 per cent of the total shareholding. It must be pointed out that of these shares, 5,252,000 are disputed. In addition, her son, Neil Wong, owns 800,000 shares which amounts to 4.8% of the total shares. The rest of the shares are held by WKT, WKC and their children. She also averred that since the days of the founder, ownership of shares was passed down to the successive generations of the Wong family. Similarly, control of the company at the board level was also passed down as her children and the children of her brothers-in-law had been appointed as directors. To sum up, she said that the management of the respondent company's business was based on mutual trust and confidence and/or good faith between the members of the Wong family and the purpose of the respondent company was for the profitable and equitable distribution of family wealth between families of the children of the founder. Since the death of WKN, the relationship of mutual trust and confidence had irretrievably broken down and hence, the reliance on the just and equitable provision to wind up WTK Realty Sdn Bhd.

[8] The other grounds pleaded in the petition are as follows. The appellants had obtained injunctions to prevent dealings with disputed shares in the companies under the WTK Group, including the WTK Realty Sdn Bhd. Thus, it would mean that the votes cannot be cast at a general meeting until the legal proceedings are resolved. Her son, Neil Wong, although a director of WTK Realty Sdn Bhd, was not allowed to inspect the books until a court order was obtained. WTK Realty Sdn Bhd did not table its annual audited accounts for the years 2013, 2014 and 2015. It failed to lodge the said accounts with the Companies Commission of Malaysia (SSM) either. WTK Realty Sdn Bhd did not declare dividends for a number of years and deprived Kathryn Ma's family a fair return. Kathryn Ma also said that in the litigation in the BVI, WKY and WKC contended that the record of companies in offshore jurisdictions had been destroyed. She said that there is a risk that a significant proportion of the factual disputes cannot be resolved.

Main Contention Of WTK Realty Sdn Bhd

[9] The respondent company contended that the winding up petition will not bring all litigation to an end as it has little bearing on the other matters pending in court. In addition, other companies are involved in those matters. In any event, WTK Realty Sdn Bhd or its contributories could obtain leave to continue with litigation even if the company is wound up. WTK Realty Sdn Bhd is a profitable going concern that has 101 employees on its payroll. Furthermore, there is no deadlock in management as WKY, as the chairman

of the Board of Directors has the casting vote in the event of a tie. In respect of the issue of dividends, WTK Realty Sdn Bhd said that the practice of not declaring dividends had been accepted by all. As for the failure to table accounts at the annual general meeting, WTK Realty Sdn Bhd said that it did not affect the business and cannot be a ground to wind up the company.

[10] The main contention of WKY and WKC is that there was no mutual trust and confidence between anyone in the family beyond the three brothers, who shared a special relationship when it came to control and management of the WTK Group of companies. In any event, it ceased upon the death of WKN and did not extend to the latter's family. Thus, in the absence of an express provision in the company's articles of association to enable the heirs of a deceased *quasi*-partner to enjoy the same rights and benefits as the deceased, all such rights and benefits had ceased. In short, the relationship of *quasi*-partner or the relationship of mutual trust and confidence cannot be transmitted to the heirs as it ended with the death of the said partner. They also averred that there was no common understanding that the immediate families of the brothers had a right to participate in the management of WTK Realty Sdn Bhd. None of the wives of the three brothers were ever involved in management. As for the children of WKN, although they were appointed as directors, they were not involved in day-to-day management. Therefore, their appointment as directors did not create a legitimate expectation that they had a right to participate in management.

[11] In respect of Kathryn Ma's argument that the purpose of the respondent was to "provide means for the profitable development and the harmonious and equitable distribution of family wealth among the various branches of the family", WKY and WKC contended that there was no evidence to support the claim. Furthermore, it was argued that Kathryn Ma adopted the opposite stand in two previous proceedings, namely, Suit 14/4 and Originating Summons No. SBW-24-39/3-2013.

Decision Of High Court

[12] The learned Judicial Commissioner made a finding based on admissions of both sides in their respective affidavits that WTK Realty Sdn Bhd is a family company. Her Ladyship noted that all the shareholders and directors of the company are from the Wong family. But she also considered the argument of the counsel for the contributories that not all family companies are *quasi*-partnerships. She noted that the petitioner, Kathryn Ma, did not plead that it was *quasi*-partnership but her counsel submitted that the just and equitable ground to wind up a company is not confined to *quasi*-partnerships only. However, counsel for all the appellants submitted that the weight of the authorities is that *quasi*-partnership analysis is the basis for the reasoning whether the just and equitable principle applies.

[13] The learned Judicial Commissioner, after citing *Goodwealth Trading Pte Ltd Re* [1991] 2 CLJ 1648; [1991] 4 CLJ (Rep) 822; [1991] 2 MLJ 314 and other cases held that Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360 did not propound that mutual trust and confidence can only be found in *quasi*-partnership cases. She held that it was a question of fact. She noted that in the instant case, the third element discussed by Lord Wilberforce was present, *ie*, if confidence is lost and a member cannot take his stake and go elsewhere. In the instant case, art. 27 of the articles of association gave the power to the Board of Directors to refuse the transfer of shares.

[14] Finally, Her Ladyship noted that in the Arctic Star petition, it was WKY who pleaded in the affidavit in support that the relationship of trust and confidence was lost and he can no longer work with the children of WKN (Neil Wong and Mimi Wong) and thus it is just and equitable to wind it up. Her Ladyship was mindful that in the Arctic Star case, there were some shareholders and directors who were not from the Wong family. She said that in the instant case, there was more reason to hold that the breakdown in relationship was a ground to wind up as all the members and directors in the instant petition are from the Wong family.

[15] In conclusion, as Her Ladyship found that there was an irretrievable breakdown in the relationship between the two factions of the Wong family and loss of mutual trust and confidence, she granted the petition to wind up. She found the liquidator proposed by both sides to be qualified but she appointed Mr Lim San Peen, who had also been appointed in other cases involving WTK companies including Arctic Star Sdn Bhd. Her reason is that it would be beneficial to have the same liquidator for the related family companies as the facts would be intertwined.

Issues In The Appeal

[16] Before us, similar issues as that raised before the High Court were argued by the appellants. It was argued that Kathryn Ma only holds shares as an executrix. She is not a founding director. Therefore, the mutual trust and confidence that was shared between the Wong brothers cannot be extended to her. So, there cannot be any loss of mutual trust and understanding. The acrimony between the heirs of WKN and other branches of the Wong family cannot be a reason to invoke the just and equitable principle to wind up the respondent company as it has nothing to do with the business of the company. The company is still profitable even after the winding up order was made. The High Court failed to take into account that there are no adverse practical consequences to the business and operations of the respondent. Furthermore, there is no deadlock in the management of the company. The appellants also submitted that the High Court failed to take into account that Kathryn Ma had a collateral purpose to present the petition to wind up the company. Finally, it was argued that the High Court erred in appointing Mr Lim San Peen as the liquidator.

[17] On behalf of Kathryn Ma, the following main issues were argued. The respondent is a family company. It was set up by the founder to generate and distribute wealth for members of the Wong family. After the death of the founder, the second generation, consisting of WKN, WKY and WKC, ran the company on the basis of mutual trust and confidence and was preparing to hand over to the third generation. Some of the children were already appointed to the Board of Directors by the time of the passing of WKN. Therefore, the argument that the relationship of mutual trust and confidence cannot extend to Kathryn Ma and children must be rejected. The relationship of mutual trust and confidence between members of the Wong family broke down completely and irretrievably after WKN died. In the premises, the High Court was justified in winding up the respondent under the "just and equitable" ground as the application of it is not confined only to *quasi*-partnerships.

[18] In the winding up petition involving another family company, *ie*, Arctic Star, WKY himself relied on the breakdown of relationship between the family of WKN and other members to wind up the said company. In addition, other companies had also been wound up on the same ground as well. As for the fact that the respondent was still making profits, it is an irrelevant consideration as the petition was not based on inability to pay debts but on the just and equitable principle. As for the allegation of bad faith or collateral purpose on the part of Kathryn Ma, it was submitted that no evidence was presented.

Whether The Respondent A Family Company?

[19] The finding of the learned Judicial Commissioner that the respondent is a family company is unassailable. In fact, this finding of the learned Judicial Commissioner was not disputed by the appellants. The respondent company was incorporated by WTK in 1981 and since then, as noted by the learned Judicial Commissioner in her judgment, management and ownership of the company, has to all intents and purposes, been the exclusive preserve of the members of the Wong family. This fact was admitted by WKC in the contributories affidavit in opposition as follows:

> The Company is the flagship company of the WTK Group. It is a family holding company where for 21 years since incorporation, the only shareholders were WTK and his 3 sons. All the directors and shareholders of the Company are or have been Wongs.

[20] It was also not disputed that after the passing of the founder, management of the company passed to the three brothers, WKN, WKC and WKY. In fact, even before the passing of the founder, WKN became the managing director of the respondent's other companies in the WTK Group. Subsequently, the children of the three brothers also participated in the management. This fact is admitted by WKC who said in para. 27 of his affidavit in opposition as follows:

> In any event, the third generation of DWTK, the founder of WTK Group, *ie*, KY's son, Patrick and KN's daughter, Mimi Wong Hou Waiand Neil were already involved in the 2nd Defendant's business, in that Patrick, Mimi and Neil were appointed to the Board of the 2nd Defendant as far back as 28/08/1996, 26/05/1997 and 22/10/1997 respectively.

[21] The three brothers also passed on their own shares to the children. WKC in his affidavit in opposition termed the gift of his shares to his son as part of "succession planning as he was already 65 years at the time."

[22] For the above reasons, we are of the view that the finding of the High Court that the respondent is a family company is undoubtedly correct.

Mutual Trust And Confidence

[23] The learned Judicial Commissioner found that the respondent company was run since inception on the basis of mutual trust and confidence. In our view, the finding of the learned Judicial Commissioner that the respondent was run on the basis of mutual trust and confidence between its shareholders cannot be challenged as there is ample evidence to support it. Our reasons are as follows.

[24] As we said earlier, the evidence that the respondent is a family company was not disputed. As stated in the Singapore High Court case of *Tang Choon Keng Realty (Pte) Ltd & Ors v. Tang Wee Cheng* [1992] 2 SLR 1114, that was cited by counsel for respondent, relationship between the family members is even more personal than that between partners. The court said at p. 25:

> Counsel for the plaintiffs has argued that there is nothing in the winding-up petition which can support this ground, and that the decisions concerning partnerships which became companies are not relevant, as TCKR was not a partnership at inception. I do not think this argument is sustainable in law having regard to the observations of Lord Wilberforce. **The relationship between members of a family company is even more personal, even if the level of mutual confidence that is necessary may not be more, than in a relationship between partners**.
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> (emphasis added)

[25] Although the abovementioned case concerned an oppression petition, the important point to note is that it is a family company. The close relationship between family members can result in a company being run on the basis of mutual trust and confidence instead of merely by way the articles of association or other formal rules.

[26] In the instant case, the contributories, *ie*, WKC and WKY, have admitted to the existence of the relationship of mutual trust and confidence between them and WKN in the running of the company. As pointed out by counsel for respondent, in para. 9 of the affidavit in opposition, WKY stated as follows:

> ... there was certainly mutual trust and confidence between the 3 brothers (WKN, WKC and me) during WKN's lifetime when it came to developing, running and expanding the WTK Group ...

[27] WKC also referred to the trust that he and WKY reposed in WKN to run the respondent company and the other companies in the WTK Group in para. 15.16 of his affidavit in opposition which is as follows:

> WKY and I trusted WKN implicitly to run WTK Realty and other companies within the WTK Group ...

[28] Furthermore, WKY, in para. 57 of his affidavit in opposition said as follows:

> ... the equal shareholding arrangement that was put in place by WTK and the understanding amongst the 3 brothers was to ensure equal distribution of wealth to us and our families.

[29] The above averment is clearly a reference to the family interest being fundamental to the purpose of the company and that the wealth generated is to be shared equally. In the affidavits, both WKY and WKC also said that they entrusted the business and management of several companies in the WTK Group to WKN. They also said that they signed documents pre-signed by WKN without reading them. Thus, the finding of fact by the learned Judicial Commissioner that the respondent company was run on the basis of mutual trust and confidence between the three brothers cannot be criticised.

Whether Mutual Trust And Confidence Extends To Kathryn Ma?

[30] The learned Judicial Commissioner held that the relationship of mutual trust and confidence existed between its members as it is a family company.

[31] The argument of the WKY and WKC is that the special relationship between the brothers cannot extend to the third generation of the family or to Kathryn Ma. For that reason, it was argued that the company was not operated on the basis of mutual trust and confidence after the death of WKN and therefore the "just and equitable" ground cannot be invoked. We agree with the learned Judicial Commissioner that the categories for the invocation of the "just and equitable" ground are not closed and that it is not limited to *quasi*-partnership companies only. We shall return to this issue later.

[32] However, in respect of the argument that the company could not have been run on the basis of mutual trust and confidence insofar as the third generation of the Wong family is concerned, we find the learned Judicial Commissioner correctly accepted the counter argument which is based on admitted evidence. The evidence is as follows.

[33] Although, the three brothers had been working closely since the time of passing of the founder, well before the passing of WKN, it must be recalled that members of the third generation had already been appointed to the Board of Directors. They include Neil Wong and Mimi Wong, who are

A the children of WKN and Patrick Wong, who is the son of WKY. The children of WKC, namely Annie Wong and Pierre, were appointed not too long after the death of WKN. The brothers also passed shares down to the children. WKC in fact said that he was planning for succession when he gave his shares to his son. It must also be noted during the lifetime of WKN and
B even after his death, no individual outside the Wong family was admitted to the Board. It is still a company that is very much in the hands of the Wong family exclusively. Thus, there appeared to be a gradual passing down of ownership and control of the respondent company from one generation to the succeeding generation in keeping with the nature of family companies that
C do not admit outsiders.

[34] It must be noted that Kathryn Ma did not plead in this case that the basis of the petition was that the relationship of trust and confidence applicable in the running of the respondent company was purely anchored on the relationship of the three brothers and that it was severed instantly
D upon the death of WKN. Rather, she pleaded that there was a breakdown of mutual trust and confidence between her family and the families of WKY and WKC.

[35] As we noted earlier, some members of the third generation of the Wong family had already been given seats on the Board and shares during
E the lifetime of WKN and the respondent company and all the other companies were being run without any dispute. In the premises, it cannot be said that the relationship of mutual trust and confidence was confined only to the three brothers. Furthermore, in the petition to wind up Arctic Star Sdn Bhd, WKY said that he could "no longer" work with Neil Wong and Mimi
F Wong and "lost" all confidence in them. As submitted by counsel for the respondent, it is implicit in this averment that a prior working relationship based on mutual trust and confidence existed between WKY and WKC or their families with the family of WKN. Finally, it must also be noted that Kathryn Ma did not present in the instant winding up petition in her personal
G capacity but in her capacity as the executrix of the estate of WKN.

Whether Just And Equitable Ground Confined To *Quasi*-partnerships Only?

[36] Counsel for the appellants argued that the company was not run as a *quasi*-partnership. For that reason, counsel submitted that the just and
H equitable principle cannot be used to wind it up.

[37] We are mindful that Kathryn Ma did not plead that the respondent was a *quasi*-partnership company. She could not have taken such a position, given the history of the company. The company was not started by the three
I brothers acting as partners. It is a traditional Chinese rags-to-riches story where an entrepreneurial patriarch created wealth and bequeathed it to the succeeding generation who vastly expanded it. However, we are in agreement with the view of the learned Judicial Commissioner that the just

and equitable ground to wind up a company cannot be limited to companies that are incorporated partnerships or are akin to a *quasi*-partnerships. Depending on the justice of the case that calls for the superimposition of equitable principles on formal company rules, it can also be applied to a strictly family company which had operated with a measure of mutual trust and confidence amongst its shareholders. Our reasons are as follows.

[38] In the celebrated case of *Ebrahimi v. Westbourne Galleries Ltd* (*supra*), the House of Lords considered the similar "just and equitable" ground for winding up a company. In that case, the company in question was found to be a *quasi*-partnership. Lord Wilberforce, who delivered the leading judgment said that the superimposition of equitable considerations may include the following elements:

> The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere. **It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves**.
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> (emphasis added)

[39] Our Federal Court in two judgments said that the elements mentioned in the above quoted passage are not essential pre-conditions for the application of the "just and equitable" ground.

[40] In *Tien Ik Enterprises Sdn Bhd & Ors v. Woodsville Sdn Bhd* [1995] CLJU 99; [1995] 1 LNS 99; [1995] 2 AMR 1033, the Federal Court approved the following passage from the judgment of the High Court in that case which is as follows:

> I cannot accept this contention as the judgment does not say that. It merely sets out the circumstances under which the equitable considerations can be adopted and by way of an illustration, the 3 elements were stated as examples for circumstances where the just and equitable provision can apply. I emphasise that *Ebrahimi*'s case does not lay down any test when the "just and equitable" provision can be applied.

[41] The Federal Court, then, went on to say as follows:

> We are of the view that the learned judge was correct in her interpretation of the judgment of Lord Wilberforce. It is not essential and therefore not a condition that before the *Ebrahimi*'s principles can be applied the

A elements or at least one of the elements mentioned by Lord Wilberforce must be present. To interpret in the way contended by the learned counsel would be putting something in the judgment which is not there.

[42] The second Federal Court decision of note that puts paid to any suggestion that elements enumerated by Lord Wilberforce in the famous B passage from the *Ebrahimi* case are exhaustive and essential pre-conditions to the application of the "just and equitable" ground is the case of *Perak Integrated Networks Services Sdn Bhd v. Urban Domain Sdn Bhd & Anor* [2018] 5 CLJ 513. That case concerned a derivative action and not a winding petition under the "just and equitable" limb. Nonetheless, it was argued that C the alternative remedy of winding up was available. The Federal Court held that the availability of the winding up remedy is not an automatic bar to a shareholder bringing a derivative action.

[43] The Federal Court in *Perak Integrated Networks Services Sdn Bhd v. Urban Domain Sdn Bhd & Anor* (*supra*) also gave its view on the elements necessary D for the superimposition of the "just and equitable" ground that was discussed by Lord Wilberforce and rejected the notion that they are essential pre-conditions. The Federal Court, after citing *Tien Ik Enterprises Sdn Bhd & Ors v. Woodsville Sdn Bhd* (*supra*) in support, said as follows:

> [71] It is noted that these elements are non-essential, and are not to be E interpreted as preconditions before the just and equitable clause can be relied upon: *Tien Ik Enterprises Sdn Bhd & Ors v. Woodsville Sdn Bhd* [1995] CLJU 99; [1995] 1 LNS 99; [1995] 1 MLJ 769 at 776.
>
> [72] Lord Wilberforce explained that through the just and equitable clause, certain obligations common to partnership relations may come in; F the analogy to partnership is convenient because the concepts of probity, good faith, and mutual confidence, developed in partnership law, become relevant considerations once the elements stated above are found to exist (at p. 379).
>
> [73] Pertinently, it was emphasised in *Ebrahimi* that it would be G "impossible, and wholly undesirable, to define" all the circumstances in which a company should be wound-up on equitable considerations (at p. 379).

[44] In particular, the Federal Court highlighted the following passage from the judgment of Lord Wilberforce where the creation of particular categories H of case for the just and equitable clause to apply was rejected. The said passage in the judgment of Lord Wilberforce is as follows:

> ... there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances. I

[45] In a number of other Malaysian and Singapore cases, whether involving *quasi*-partnership or incorporated partnerships or otherwise, the courts have ruled that the "just and equitable" principle in a winding up petition is a dynamic concept that cannot be limited to the pre-conditions discussed by Lord Wilberforce which are only an illustration.

[46] In *Chow Kwok Chuen v. Chow Kwok Chi And Anor* [2008] 4 SLR(R) 362, the Singapore Court of Appeal said as follows:

> "[17] ... The concept of 'just and equitable' is a dynamic one and we should not circumscribe its scope by reference to case law when the cases themselves do not seek to do more than apply the concept of 'just and equitable' to the circumstances of each case.
>
> ...
>
> [27] In this regard, we think it important to bear in mind that Lord Wilberforce in *Ebrahimi* did not rule that the 'just and equitable' analysis was only to be applied in situations of *quasi*-partnership.

[47] We also derive much assistance from the unreported High Court judgment of Wong Chee Lin J in *Tai Hean Leng v. New Future Capital Sdn Bhd* [2018] CLJU 1647; [2018] 1 LNS 1647, where the background facts are somewhat similar. Without delving in detail into the facts of the case, what is relevant to note is that it was a family company that did not involve any outsiders on the Board of Directors. The warring parties initiated several suits against each other including an oppression petition. However, when conclusion of the various suits failed to achieve a clean break in the relationship of the parties, the petitioner filed a petition to wind up the family company on the "just and equitable" ground.

[48] Wong Chee Lin J after referring to *Perak Integrated Networks Services Sdn Bhd v. Urban Domain Sdn Bhd & Anor* (*supra*) and other cases, rejected the argument that the "just and equitable" ground is limited to *quasi*-partnerships only. Her Ladyship said as follows:

> [33] 'Mutual trust and confidence' is clearly not an exclusive peculiarity of *quasi*-partnership companies. Mutual trust and confidence is generally the bedrock of family companies and where family interest is fundamental or closely related to the *raison d'etre* of the company, applicable considerations apply. In *Tang Choon Keng Realty (Pte) Ltd v. Tang Wee Cheng* [1991] 2 SLR(R) 1, Chan Sek Keong J (as he then was) in rejecting the submission that mutual trust and confidence is only peculiar to *quasi*-partnership companies said that relationship between family members is even more personal than between partners.

[49] And in *Tan Keen Keong v. Tan Eng Hong Paper & Stationery Sdn Bhd & Ors And Other Appeals* [2021] 2 CLJ 318, which is the most recent Federal Court decision that touched on the "just and equitable" ground for winding up, Mary Lim FCJ emphatically said that the said ground is not limited to a *quasi*-partnership situation only in the following paragraphs of the judgment:

A [41] In *Ebrahimi*, the just and equitable ground was applied in a *quasi*-partnership situation; where the Privy Council explained that the basis allowed the court to subject the exercise of legal rights by one party to equitable considerations such that it makes the insistence on those legal rights or the exercise of such rights, unjust or inequitable; and "that the only just and equitable course was to dissolve the association". *Because of this, it is often mistakenly argued that the 'just and equitable' ground can only be deployed in quasi-partnerships or where at least one of the factors or elements identified in Ebrahimi is established.*

[42] *Fortunately, this argument was rejected in Tien Ik Enterprises Sdn Bhd & Ors v. Woodsville Sdn Bhd [1995] 1 LNS 99; [1995] 1 MLJ 769 where the Supreme Court agreed with the High Court's interpretation of the judgment of Lord Wilberforce in Ebrahimi that "... It is not essential and therefore not a condition that before the Ebrahimi principles can be applied, the elements or at least one of the elements mentioned by Lord Wilberforce must be present*. To interpret in the way contended by the learned counsel would be putting something in the judgment which is not there." We add that the equitable considerations in *Ebrahimi* were intended only as illustrations of circumstances where the just and equitable ground may apply. This ground is of wide and general import and it is met by sufficiency of context, facts and circumstances available for the trial judge to form the requisite opinion.

(emphasis added)

[50] In fact, in the older Singapore case of *Goodwealth Trading Pte Ltd, Re* [1991] 2 CLJ 1648; [1991] 4 CLJ (Rep) 822; [1991] 2 MLJ 314, Yong Pung How CJ presciently said that the categories to which the "just and equitable" ground can be applied will be expanded in the following passage of his judgment:

The petition to wind up the company was presented on the ground that it would be just and equitable to do so. There is now a practically unlimited range of circumstances within which a winding-up order can justifiably be made on this ground. Judicial interpretation has added steadily to the categories of cases which may be brought under this ground, and it is inevitable that still more categories will be added by the courts in future. Among the most common cases have been those in which a director has been ousted from office, or where a deadlock has developed in the management of the company's affairs, or where directors have lost confidence in working with each other, or where the company's substratum has disappeared. Although, for convenience, it has been possible to separate the cases into different categories, a principle which has become increasingly accepted is that courts will not hesitate to provide relief and wind up a company, as they would a partnership, if it is clear that the parties involved will no longer be able to work together.

[51] Thus, it must be appreciated that the "just and equitable" ground has been broadly applied in many cases and is not limited to *quasi*-partnership cases.

Finding Of Breakdown Of Mutual Trust And Confidence

[52] In the winding up petition, Kathryn Ma pleaded that there was a breakdown of trust between her family and the families of WKY and WKC after her husband died. She did not merely plead that the relationship of mutual trust and confidence between the three brothers, which, was the basis on which the respondent company was run, ceased to exist upon the death of WKN.

[53] The learned Judicial Commissioner found as a fact that there was a complete breakdown of the relationship of mutual trust and confidence between WKN's family and the families of WKY and WKC since the death of WKN in 2013. Her finding is well supported given the litany of suits including winding petitions that the two factions of the Wong family have filed against each other. In Annexure A which was placed before the learned Judicial Commissioner, 40 separate sets of legal proceedings in Sarawak alone between the two warring factions of the Wong family were listed. The fact that the two factions of the Wong family cannot get along well with Kathryn Ma's family is not disputed. In his affidavit in opposition, WKY agreed that the "parties cannot get along and have sued each other extensively" and that there is "acrimony and extensive litigation". WKC, in his affidavit in opposition, referred to the litigation as "evidence of the underlying acrimony that only reared its ugly head after the death of WKN".

[54] The breakdown of mutual trust and confidence between the factions of the Wong family also figured prominently in other winding up petitions. In three other companies in the stable of the WTK Group (Ocarina Development Sdn Bhd, Harvard Master Sdn Bhd and TMC Importer and Exporter Sdn Bhd), where the same two factions were pitted against each other, the courts made a finding that the relationship and confidence between them had broken down.

[55] The learned Judicial Commissioner also noted that in their winding up petition against Arctic Star Sdn Bhd, the contributories herein, *ie*, WKC and WKY themselves, had relied on the "just and equitable" ground because of the breakdown of mutual trust and confidence between them and the family of Kathryn Ma, which included her son, Neil Wong, and daughter, Mimi Wong. Neil Wong and Mimi Wong were directors of Arctic Star Sdn Bhd and were in control of the company. In that petition, WKY averred that the relationship of mutual trust and confidence that he placed in the late WKN in the management of the company was no longer there since the company came under the control of Neil Wong, Mimi Wong and Kathryn Ma in her capacity as the executor of the estate of WKN. In that petition, WKY also referred to the acrimonious relationship that developed between him and Kathryn Ma's family that resulted in the ongoing civil litigation.

[56] Counsel for the appellants submitted that the learned Judicial Commissioner erred in taking into account the averments of WKC and WKY in the Arctic Star winding up petition. We see no merit in this complaint. The limb relied in the instant winding petition is the "just and equitable" ground. That calls for a fact sensitive exercise as noted by the learned Judicial Commissioner. In the premises, the court can take into account all relevant circumstances that led to the filing of the petition including the fact that other winding up petitions had been filed against related companies by the same parties. In the *Ebrahimi* case, Lord Wilberforce said that the words "just and equitable" are not only confined to the capacity of the petitioner as a shareholder but on any circumstance of justice or equity. The relevant passage is as follows:

> Secondly, it has been suggested, and urged upon us, that (assuming the petitioner is a shareholder and not a creditor) the words must be confined to such circumstances as affect him in his capacity as shareholder. I see no warrant for this either. No doubt, in order to present a petition, he must qualify as a shareholder, but I **see no reason for preventing him from relying upon any circumstances of justice or equity which affect him in his relations with the company, or, in a case such as the present, with the other shareholders.**
>
> (emphasis added)

[57] Therefore, the fact that the contributories herein had taken an opposite stand in a petition to wind up a related company controlled by the family of Kathryn Ma is relevant though not necessarily determinative of the petition in question.

[58] Therefore, we find that the learned Judicial Commissioner had not erred in making the finding that the relationship of mutual trust and confidence between the family of Kathryn Ma and that of WKY and WKC had broken down.

Whether Just And Equitable To Wind Up Company?

[59] In a plethora of cases, breakdown of mutual trust and confidence among shareholders in a family company was found to be sufficient to invoke the "just and equitable" ground for winding up. We are mindful that in some of these cases, other *Ebrahimi*'s elements such *quasi*-partnership were present. However, the complete breakdown of relations between different branches of the family members in a more or less purely family-owned and controlled company was a major reason that sealed the fate of the company. We shall briefly discuss some of these cases below.

[60] In *Varusay Mohamed Shaik Abdul Rahman v. SVK Patchee Brothers (Malaysia) Sdn Bhd* [2002] 3 CLJ 741, the company in question was a pre-existing partnership that had been incorporated. A dispute arose between the descendants of the patriarch, who founded the company. The petition to wind up was filed under the "just and equitable" ground. The company was,

at the material time, a going concern and capable of making profits but the court ordered it to be wound up under the "just and equitable" ground because of the breakdown of relationship between family members who owned it.

[61] In *Narayani Sivaprakaspillai & Ors v. Teluk Anson Agricultural Enterprises Sdn Bhd* [2011] CLJU 989; [2011] 1 LNS 989, the founder of the company was the deceased grandfather and the dispute was between his grandchildren. The court found that the element of *quasi*-partnership was present. Nonetheless, the reason for invoking the "just and equitable" ground was the breakdown of mutual trust and confidence between members in family company.

[62] It is also apposite to consider the observation of the Singapore Court of Appeal in the case of *Chow Kwok Chuen v. Chow Kwok Chi And Anor* (*supra*). In that case, the eldest son presented a petition to wind up the companies founded by his father under the "just and equitable" ground. The companies yielded profit at the material time. The petitioner's two brothers opposed the petition.

[63] The Singapore Court of Appeal found that the companies were not *quasi*-partnerships though they shared some characteristics with one. Nonetheless, given the breakdown of relations of mutual trust and confidence between the family members, the court allowed the petition. This finding is clear from the following passage of the judgment:

> 34. *Although the Companies were not quasi-partnerships, it was clear that mutual trust and confidence among the brothers was the cornerstone of the entire set-up*. We agree with the Judge that the Companies and their directors' relationships shared certain characteristics with *quasi*-partnerships: not only were the shares of the Companies closely held and not easily transferable to outside parties, and not only did the directors hold their positions due to ties of blood rather than to business acumen or commercial considerations, but the parties really had not on their own accord voluntarily entered into legal relations with one another to promote some common business interest. Instead, they inherited or were endowed their shares and directorships by their parents, based on the latter's understanding or aspiration of furthering the family's interests cohesively. ...
>
> *Thus mutual trust and confidence were inherently essential to Mr Chow's objective in incorporating the Companies. Upon the breakdown of such mutual trust and confidence, the entire purpose of the Companies was destroyed, notwithstanding that the Companies' properties continued to yield rental income*.
>
> (emphasis added)

[64] For the above reasons, we are of the view that on the peculiar facts of this case, the breakdown in mutual trust and confidence amongst family members justified the invocation of the "just and equitable" ground for winding up by the High Court. Before we conclude, we shall consider other issues argued by counsel for the appellants.

A **Profitability Of Company**

[65] Counsel for the appellants, citing evidence, argued that the respondent company is a going concern and was a profitable enterprise and for that reason should not be wound up. It was pointed out that in the financial year 2015 and 2016, the company's profits were in the sum of RM12,432,017 and
B RM24,964,025, respectively. The learned Judicial Commissioner was aware of this argument as she referred to it in para. 42 of her judgment but it is apparent that she found that it was not relevant for a winding up petition based on the "just and equitable" ground.

C **[66]** We are of the view that the fact that a company is yielding profits is not necessarily relevant for a petition presented under the "just and equitable" ground. In *Varusay Mohamed Shaik Abdul Rahman v. SVK Patchee Brothers (Malaysia) Sdn Bhd* (*supra*) and *Chow Kwok Chuen v. Chow Kwok Chi And Anor* (*supra*) that we adverted to earlier, the court was mindful of the profitability of the companies in question but nonetheless proceed to grant
D the petition as the "just and equitable" ground was satisfied. In *Tan Keen Keong v. Tan Eng Hong Paper & Stationery Sdn Bhd & Ors And Other Appeals* (*supra*), Mary Lim FCJ pronounced as follows in respect of the relevancy of profitability of a company when a winding up petition is presented under the "just and equitable" ground:

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> [38] The 'just and equitable' ground is not dependent on establishment of insolvency although it is frequently relied on as an additional or alternative ground; in fact it is despite the company being solvent that there are nevertheless satisfactory reasons for the court to form an opinion and exercise its discretion that it is just and equitable to order a
F winding-up.

Absence Of Deadlock

[67] Counsel for the appellants argued that the learned Judicial Commissioner did not consider the fact that there was no deadlock in the management of the respondent company and that this fact was not considered
G by the learned Judicial Commissioner. In para. 43 of the judgment, the learned Judicial Commissioner acknowledged this argument. However, Her Ladyship did not further refer to it in her judgment. Be that as it may, we do not find that this ground of appeal has any merit for the following reasons.

H **[68]** Counsel for the respondent did not dispute that the fact there was no technical deadlock in the management of the company as WKY in his capacity as chairman held casting vote at the Board of Directors meetings. Nonetheless, he pointed out the basis for the invocation of the "just and equitable" ground in this case is the breakdown of mutual trust and confidence between the family members, who are shareholders and Kathryn
I Ma, who is the executrix of the estate of her husband. Deadlock in management was not the basis of the winding up petition.

[69] In the cases that we discussed earlier in respect of the issue of whether the pre-conditions stated by Lord Wilberforce in the *Ebrahimi* case are essential, it has been said that the "just and equitable" concept is a dynamic one and that there is no test for it. In *Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd* [2010] 8 CLJ 775, the Court of Appeal said that a myriad of circumstances including deadlock in management can be considered in winding up a company under the "just and equitable" ground and that the list of illustrations given in that case is not exhaustive. In *Perak Integrated Networks Services Sdn Bhd v. Urban Domain Sdn Bhd & Anor* (*supra*), the Federal Court after reviewing authorities that discussed the deadlock and the "just and equitable" ground, said that a deadlock scenario is one of the circumstances to wind up a company under it. As we said earlier, in the instant case, deadlock in management was not the basis of the petition. Complete breakdown mutual trust and confidence between family members was the basis of the winding up petition presented under the "just and equitable" ground.

Bad Faith And Collateral Purpose

[70] The appellants also argued before the learned Judicial Commissioner that the petition was presented for a collateral purpose and in bad faith. It was submitted before us that the learned Judicial Commissioner did not consider this ground that was canvassed to oppose the petition. The learned Judicial Commissioner mentioned this issue in her judgment but did not give her views on it. We find that she did not err in not taking into account this ground of opposition to the petition for the following reason. The appellants did not present any evidence of Kathryn Ma's bad faith apart from making averments in the affidavits to oppose the petition. All these averments were denied by Kathryn Ma in the reply affidavits. As pointed out by counsel for the respondent, the appellants did not apply to cross-examine Kathryn Ma in respect of the allegation of bad faith and collateral purpose in presenting the winding up petition. It must also be noted that in other winding up petitions in respect of companies in the WTK Group, the petitions were granted although bad faith on the part of Kathryn Ma was also raised. As there was no clear evidence of bad faith apart from conflicting averments in opposing affidavits, the omission of the learned Judicial Commissioner to discuss this issue is of no consequence.

Availability Of Alternative Remedies

[71] Counsel for the appellants also argued that the learned Judicial Commissioner did not consider whether there was an alternative remedy under the "just and equitable" ground instead of the drastic remedy of wind-up. This argument was also canvassed in the Federal Court of *Tien Ik Enterprises Sdn Bhd & Ors v. Woodsville Sdn Bhd* (*supra*) that we discussed earlier. The Federal Court, after discussing the position in the United Kingdom, Australia and Singapore, said that when a petition under

s. 218(1)(i) of the Companies Act 1965 (equivalent of s. 465(1)(h) of the Companies Act 2016) is presented, it is not obligatory to consider alternative remedies before making a winding up order. The relevant passage of the Federal Court judgment is as follows:

> The learned counsel for the appellants contended that the decision in the Singapore case is wrong. But how can it be wrong when the decision is based on the correct premise? How can cases from other jurisdictions be relevant when they are decided on provisions of law which are absent in the local legislation?
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> The position is the same here. The United Kingdom and the Australian provisions are not in our Companies Act 1965. We should not write them into our Act.
>
> *We are of the view that the Singapore decision is correct. It is not obligatory for our courts to consider the availability of alternative remedies before making a winding-up order under s 218(1)(i) of the Companies Act 1965.*
>
> (emphasis added)

Appointment Of Liquidator

[72] The learned Judicial Commissioner appointed Mr Lim San Peen of PricewaterhouseCoopers Advisory Sdn Bhd (PWC), who was nominated by the petitioner as the liquidator instead of Mr Wong Ching Yong of Wong Ching & Co from Sibu. The appellants have also appealed against this decision of the learned Judicial Commissioner.

[73] The main ground of criticism has to do with the fact that Mr Lim is based in Kuala Lumpur, whereas Mr Wong is based in Sibu. The appellants have argued that it is more practical to appoint Mr Wong as the respondent company's registered and also business address is in Sibu. Furthermore, all shareholders and directors reside in Sarawak and there are qualified liquidators in the State.

[74] The second ground of appeal in respect of the appointment of the Mr Lim has to do with the fact that Neil Wong, son of Kathryn Ma, had proposed in 2013 that PWC be appointed to assess the respondent company's true financial position.

[75] The learned Judicial Commissioner dismissed the objection of the appellants. Her Ladyship said that the appointment of Mr Lim would be beneficial as he was already appointed as the liquidator in several other liquidations involving companies in the WTK Group including the Arctic Star liquidation. We see no appealable error in her decision for the following reasons.

[76] Firstly, we note that no argument was advanced that Mr Lim is not qualified to be appointed under s. 477 of the Companies Act 2016. In fact, it is a matter of record that Mr Lim is the appointed liquidator in other liquidations involving companies in the WTK Group as noted by the learned Judicial Commissioner.

[77] Secondly, the appointment of a liquidator is a matter of discretion vested in the winding up court. In the premises, there must be a very good reason for appellate interference. The learned Judicial Commissioner said that the appointment of Mr Lim is beneficial as he has been appointed as the liquidator for companies in the same group. We do not see anything wrong with Her Ladyship's reasoning from the stand point of practicality. In the Privy Council case of *Parmalat Capital Finance Ltd And Others v. Food Holdings Ltd (In Liquidation) And Another* [2008] UKPC 23, there was an appeal against the winding up order and the appointment of liquidators. It was argued that the liquidators were in a position of conflict of interest because they were also the liquidators of the respondent. The Privy Council rejected the argument and observed as follows:

> [12] Finally, there is the question of whether the judge should have appointed the Cayman liquidators rather than the candidates proposed by other creditors. *That is very much a matter of discretion and where, as in this case, the exercise of the discretion has been upheld by the local Court of Appeal, it would be very unusual for the board to interfere*. In considering the views of creditors, the judge discounted the views of other members of the Parmalat group which held intra-group indebtedness. There is ample authority for doing so: see, for example, *Re Falcon RJ Developments Ltd* [1987] BCLC 437. He gave some weight to the fact that the Cayman liquidators had been in office for nearly three years and the delay and expense which would be caused if new liquidators were to take over. These too were proper matters to be taken into account.
>
> [13] The consideration to which Mr Moss says he did not give sufficient weight was the conflict of interest between the position of the Cayman liquidators as liquidators of Food and Dairy on the one hand and of PCFL on the other. *It is not unusual for the same liquidators to be appointed to related companies, even though the dealings between them may throw up a conflict of interest. It avoids the expense of having different liquidators investigate the same transactions. The attitude of the court has been that any conflicts of interest can be dealt with by the court (on the application of the liquidators) when they arise: see Re Arrows Ltd [1992] BCC 121, Re Maxwell Communications Corp Pic [1992] BCLC 465*.
>
> (emphasis added)

[78] In respect of the argument of counsel for the appellants that Mr Lim could be conflicted because Neil Wong had in 2013 proposed for his firm, *ie*, PWC to be appointed to assess the accounts of the respondent company, we see no merit in it. It must be noted that there is no suggestion that Mr Lim had any improper dealings with Neil Wong to the extent that his professionalism and impartially can be called into question. It was only a mere matter of his firm being considered to carry out assessment of the accounts. In the case of *Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals* [2012] 2 CLJ 501, the Federal Court cautioned against questioning the impartiality of a liquidator merely because of a prior audit relationship and nothing more. The Federal Court said as follows:

A [28] Apparent conflict is said to arise in the present case because of the connection between the liquidators who are partners in KPMG operating out of KL/Selangor, and KPMG's Penang branch who were the auditors of Can-One at the nominal fee of RM1,000.00 per year for Can-One. *The question is whether this limited connection between the liquidators who are personally appointed under statute and the auditors in Penang (KPMG) gives rise to a*
B *reasonable apprehension of lack of impartiality on the liquidator's part*. We are of the view the commercial reality is that large accounting practices will give rise to associations with persons whom insolvency practitioners will sell assets to ...

[29] *Commercial reality dictates that the existence of such relationship by itself should*
C *not disqualify liquidators or their audit clients.* There is no express prohibition by the winding up legislation.

(emphasis added)

[79] Similarly, in the instant case, there was no evidence placed before the High Court to credibly impugn the independence and impartiality of
D Mr Lim. Assuming such evidence is forthcoming in the course of the liquidation, there is nothing to prevent the appellants from applying to remove Mr Lim as suggested in the case of *Parmalat Capital Finance Ltd And Others v. Food Holdings Ltd (In Liquidation) And Another* (*supra*).

Conclusion

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[80] In conclusion, for all the above reasons, we do not find the decision of the learned Judicial Commissioner to grant the petition to wind up the respondent company to be plainly wrong and therefore we are not minded to interfere with it.

F **[81]** In the premises, we unanimously dismiss both appeals with costs and affirm the decision of the High Court. In respect of the first appeal (Q-02(NCVC)(A)-2476-12/2017), we order the appellant to pay costs of RM10,000 to the respondent. In respect of the second appeal (Q-02(NCVC)(A)-2490-12-2017), we order the appellants to pay costs of
G RM40,000 to the respondent. Both costs orders are subject to payment of allocatur.

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